STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
v	No. 261600 Wayne Circuit Court
AUBREY ALAN EVANS, Defendant-Appellant.	LC No. 04-007568-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions finding defendant guilty, but mentally ill, of second-degree murder, MCL 750.317, and assault with intent to commit murder, MCL 750.83. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

Defendant's convictions arose from the stabbing of his parents on July 6, 2004. While his mother was sitting in her wheelchair with his father sitting next to her at the dining room table, defendant's mother testified that when she looked up she saw her son holding a knife. She began screaming, but defendant began stabbing her in the hand, neck, chest and head. She further testified that defendant then pushed his father to the ground and stabbed him repeatedly. When the police arrived on the scene, they saw defendant's mother covered in blood and his father unresponsive and lying face down on the floor. Defendant's mother immediately identified defendant as the assailant and when the officers went looking for defendant, they observed him walking down the street with cuts on his fingers and blood on the front and back of his shirt.

Following his arrest, defendant was examined by Steven Miller, a psychologist and forensic examiner, who concluded that at the time of trial, defendant fell within the legal definition of mental illness. However, Miller was unable to determine whether defendant was legally insane.

Defendant claims on appeal that he was denied a fair trial because the prosecutor's comments during rebuttal closing argument denigrated defense counsel. During defense counsel's closing argument, he put forth two alternative arguments: first, that even if defendant's mother was credible, defendant was not guilty because he lacked the requisite intent, and second, that the jury should not believe defendant's mother. During his rebuttal argument,

the prosecutor labeled defense counsel's argument as a "red herring" and "hogwash" and that the jury may as well believe that spacemen committed the crime, while contending that the whole point behind defense counsel's arguments was to distract the jury from the facts presented at trial. No objection was made by defense counsel to the prosecutor's depiction of his arguments.

We review unpreserved issues of prosecutorial misconduct for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). To avoid forfeiture, defendant must show plain error that affected his substantial rights, i.e., that the error was outcome determinative. *Carines*, *supra* at 763-764. If a curative instruction could have alleviated any prejudicial effect, there is no reversible error. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Prosecutorial misconduct occurs if a defendant is denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Further, it is improper for a prosecutor to suggest that defense counsel is intentionally trying to mislead the jury. *Watson*, *supra* at 592, citing *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). However, "the prosecutor's comments must be considered in light of defense counsel's arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Thus, a comment that might otherwise be improper "may not rise to an error requiring reversal when the prosecutor is responding to defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

> Defendant argues that the prosecutor denigrated defense counsel as follows:
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> It's what you call the shotgun approach. And in this case it was sort of reversed. The first one was hey, if you find my guy did it, that's fine, but you know, he didn't have the right intent. You therefore have to - - can acquit him because he killed Clyde, (defendant's father) and he assaulted his mother [sic]. But he really didn't have the right intent. That was the defense number one. Then a fallback position of you know what, I'm still going to say somebody else did it defense.
>
> Now let's stop for a second and take a look at what happens in an argument. Sometimes the defense argument raises, it's called a red herring. For those of you who are familiar with Alfred Hitchcock, it's called a McGuffin. It's some type of argument that focuses your attention over here, and it's not important when the real important stuff goes over here.
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> * * *
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> Simply put there is no way to attack [Pansy Evans's] (defendant's mother) credibility. It's an attempt to do as good a job as can be done. But [defendant] is like a drowning man who will grab at any straw, any little scrap that comes along in the hope that someone, one person will fall for it in this case. And again like I

> said, I almost feel like I have to do two rebuttals to the "two" theories presented to you.
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> * * *
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> But why is it made, hopefully to distract someone; hopefully to make someone say it's possible three Martians could have landed and broke into this house and tried to abduct them. That's what we have happening here.
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> * * *
>
> Ladies and gentlemen of the jury, if you use your common sense the way I summed this up, you have on one hand a story that is clearly what happened, and you have on the other hand a story that is tantamount to saying that someone came down from outer space and did it. [Footnote added.]

Furthermore, it is clear that the prosecutor was responding to these arguments. *Messenger*, *supra* at 181. First, the prosecutor used the term "the shotgun approach," to describe defense counsel's strategy of using alternative arguments. None of the comments made by the prosecutor were intended to denigrate defense counsel. Rather, the prosecutor explained that these comments referred to defense counsel's theory that someone else may have been the killer. In fact, it is clear in context that the prosecutor used this language to emphasize his argument that defense counsel's theory was distracting because it contradicted the physical evidence that actually supported defendant mother's testimony.

Consistent with this emphasis, the prosecutor also compared defense counsel's argument to the possibility that "Martians" from "outer space" committed the crime. Although an outlandish comparison, it should be noted that throughout his rebuttal, the prosecutor did not distort the substance of defense counsel's argument. Rather, the prosecutor stated, "[t]he second half of defense [counsel's] argument in this case is that there is another party out there who committed this murder." In light of this, it cannot be said that the prosecutor implied that defense counsel was intentionally trying to mislead the jury with this comment. *Watson*, *supra* at 592. Rather the prosecutor was trying to make a point that the evidence rendered defense counsel's argument highly improbable. Ultimately, the prosecutor's remarks conveyed his belief that defense counsel's argument ignored the evidence and that the evidence created the reasonable inference that defendant was guilty. Therefore, because the context of the prosecutor's rebuttal indicates that he was responding to defense counsel's arguments, the prosecutor's comments did not deny defendant of a fair trial. *Kennebrew*, *supra* at 608.

Further, defendant has failed to show that the prosecutor's comments were outcome determinative. Besides the consistent testimony at trial by the prosecution's witnesses, the trial court instructed the jury that they could not consider the lawyers' arguments as evidence. Thus, given that juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the prosecutor's comments were not outcome determinative.

Next, defendant argues that defense counsel's failure to object to the prosecutor's comments during rebuttal constituted ineffective assistance of counsel, denying him a fair trial. Defendant failed to preserve this issue because he did not move for a new trial or evidentiary

hearing below. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Therefore, we limit our review to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Furthermore, it is presumed that a defendant was provided effective assistance of counsel. *Id*.

Because the prosecutor's comments were a proper response to defense counsel's argument, any objection by defense counsel to these comments would have been futile. Given that "defense counsel is not required to make a meritless motion or a futile objection," *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), it was objectively reasonable for defense counsel not to object to these comments, *Effinger*, *supra* at 69. Moreover, because the prosecutor's comments were proper, any objection could not have changed the outcome of the proceedings. *Id*. Therefore, defense counsel did not render ineffective assistance that denied defendant a fair trial.

Finally, defendant argues that his sentences of "natural life" are invalid under the law. This issue is unpreserved because defendant failed to raise this objection at the sentencing hearing. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). Thus, we review this issue for plain error to determine whether defendant's substantial rights were affected. *Id*. citing *Carines*, *supra* at 763-764.

Both second-degree murder and assault with intent to commit murder carry a maximum sentence of "life or any term of years." MCL 750.317; MCL 750.83. Our Supreme Court has held that because a trial court does not have the authority to impose a life without parole sentence for second-degree murder and assault with intent to murder, the use of the words "natural life" in a judgment of sentence "constitutes ineffectual surplusage." *Glover v Parole Bd*, 460 Mich 511, 514 n 3; 596 NW2d 598 (1999), citing *People v Rowls*, 28 Mich App 190, 194; 184 NW2d 332 (1970). Further, the word "natural" cannot be a restriction or limitation on the word "life" because such a restriction or limitation would result in a legally impermissible sentence. *Rowls*, *supra* at 194. Therefore, the use of the words "natural life" in the judgment of sentence, here, are mere "ineffectual surplusage" that do not affect defendant's parole eligibility. *Glover*, *supra* at 514.

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello